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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Eric Kevin Pesqueira,

No. CV 15-1426-PHX-DGC (ESW)

10 Plaintiff,

11 v.

ORDER

12 Charles Ryan, et al.,

13 Defendants.

14
15 Plaintiff Eric Kevin Pesqueira, who is confined in the Arizona State Prison
16 Complex-Lewis, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983
17 (Doc. 1) and paid the required filing and administrative fees. The Court will dismiss
18 Defendants Ryan, Pratt, McKamey, Corizon, Sedlar, Reece, and Does I-IV. Plaintiff will
19 be given 30 days to file a response containing additional information regarding the
20 Defendant identified in the Complaint as “John Doe Nurse.”

21 **I. Statutory Screening of Prisoner Complaints**

22 The Court is required to screen complaints brought by prisoners seeking relief
23 against a governmental entity or an officer or an employee of a governmental entity. 28
24 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
25 has raised claims that are legally frivolous or malicious, that fail to state a claim upon
26 which relief may be granted, or that seek monetary relief from a defendant who is
27 immune from such relief. 28 U.S.C. § 1915A(b)(1)-(2).

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1 A pleading must contain a “short and plain statement of the claim *showing* that the
 2 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
 3 does not demand detailed factual allegations, “it demands more than an unadorned, the-
 4 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 5 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 6 conclusory statements, do not suffice.” *Id.*

7 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 8 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 9 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
 10 content that allows the court to draw the reasonable inference that the defendant is liable
 11 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
 12 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
 13 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
 14 specific factual allegations may be consistent with a constitutional claim, a court must
 15 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
 16 at 681.

17 But as the United States Court of Appeals for the Ninth Circuit has instructed,
 18 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
 19 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less
 20 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

22 **II. Complaint**

23 In his Complaint, Plaintiff asserts two claims of constitutionally deficient medical
 24 care arising out of injuries he sustained while playing basketball in the Special
 25 Management Unit I (“SMU I”) at ASPC-Florence. He names as Defendants Charles
 26 Ryan, the Director of the Arizona Department of Corrections (“ADOC”); Richard Pratt,
 27 the Division Director of Health Services; Corizon Health, a contracted Health Care
 28 Provider; Arlene McKamey, a Health Care Provider; Nurse Sedlar, a Nurse at SMU I; Dr.

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1 Edward Reece, a hand surgeon contracted by ADOC; "John Doe Nurse," a Nurse at SMU
2 I; and John/Jane Does I-IV, who are identified as medical staff at ASPC-Eyman. He
3 seeks injunctive relief and monetary damages.

In Count One, Plaintiff alleges that he fell while playing basketball at SMU I on September 25, 2013. As a result of the fall, his right hand was “severely injured[,] displaying extreme swelling, extreme dark bruising[,] loss of mobilit[y,] and a bone loosely shifting in the metacarpals.” Over the course of the next several weeks, Plaintiff brought his injury to the attention of several nurses, both verbally and in written health needs request forms (“HNRs”). He requested medical care from Defendant Sedlar and was told by Sedlar that “the provider wasn’t in,” “the provider wouldn’t talk to her (that day),” and he was “on the list for x-rays.” According to Plaintiff, he was never placed on an emergency line, and his records showed that he was not seen by a provider until “much later.” Another nurse (“Doe #1”) told Plaintiff that “she was letting Sedlar take care of it” and failed to put Plaintiff on the emergency line, in violation of prison policy. John Doe Nurse “straight out told [Plaintiff] that he would have to wait for [his] HNR to be answered.” John Doe Nurse would not call Plaintiff in or provide any ice or pain management “despite being aware of the severity” of Plaintiff’s injury. Plaintiff showed his hand to other unidentified nurses, but still was not “called to medical.”¹ Plaintiff submitted an HNR on October 4, 2013, that “describ[ed] the . . . injuries,” and Doe #2 responded by stating that Plaintiff would be placed on “NL.” “At no time” was Plaintiff provided pain management.

22 On October 17, 2013, Plaintiff received x-rays that revealed he had broken his
23 fourth and fifth metacarpals. He was sent to a physician for treatment on November 4,
24 2013, but by that time “it was too late for him to receive the necessary surgical fix[].” On
25 December 16, 2013, it was discovered that Plaintiff could no longer fully extend the

¹ Count One also includes an allegation against Nurse Salas. Plaintiff's allegation against Salas is not addressed herein, however, as Salas was not identified as a Defendant.

1 fingers he had broken. According to the Complaint, if Plaintiff had received timely
 2 treatment, he would have “been treated much differently with the expectation of a better
 3 outcome.” Plaintiff further alleges that Defendant Reece would not operate on his
 4 fingers unless he also performed surgery on Plaintiff’s wrist. According to Plaintiff,
 5 Reece “has an interest in minimizing surgical procedures due to the contract in place”
 6 with ADOC.

7 Plaintiff claims that Defendant Ryan is responsible for “establishing, monitoring[,]
 8 and enforcing overall operations, policies[, and] practices of ADOC,” and Defendant
 9 Pratt “is responsible . . . for establishing monitoring[,] and enforcing system-wide health
 10 care policies and practices.” Plaintiff also claims that Corizon failed to properly train its
 11 Nurses and attributes part of the delay in treatment to a staff shortage. As a result of
 12 Defendants’ conduct, Plaintiff claims, he suffered “extreme physical pain,” and incurred
 13 permanent damage to his fingers.

14 Plaintiff’s allegations in Count Two “involve the same exact incident” and are
 15 “identical [to] those in Count [One]” except insofar as they address the injury to his wrist,
 16 rather than his hand. According to the Complaint, when Plaintiff fell on September 25,
 17 2013, he suffered significant damage to his wrist that led to a “permanent inability to
 18 extend or fully bend” it. In addition, he experienced “unrelenting significant” pain.
 19 Plaintiff alleges that “[A]DOC failed to provide pain management deliberately,” and even
 20 when he “did receive a provider who was working to find a treatment plan,” ADOC
 21 “denied her first requested medication without offering a specific alternative.”

22 **III. Failure to State a Claim**

23 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants
 24 (2) under color of state law (3) deprived him of federal rights, privileges or immunities
 25 and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th
 26 Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm’n*, 42 F.3d
 27 1278, 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that he suffered a specific
 28 injury as a result of the conduct of a particular defendant and he must allege an

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1 affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*,
 2 423 U.S. 362, 371-72, 377 (1976).

3 Not every claim by a prisoner relating to inadequate medical treatment states a
 4 violation of the Eighth or Fourteenth Amendment. To state a § 1983 medical claim, a
 5 plaintiff must show that the defendants acted with “deliberate indifference to serious
 6 medical needs.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting *Estelle v.*
 7 *Gamble*, 429 U.S. 97, 104 (1976)). A plaintiff must show (1) a “serious medical need”
 8 by demonstrating that failure to treat the condition could result in further significant
 9 injury or the unnecessary and wanton infliction of pain and (2) the defendant’s response
 10 was deliberately indifferent. *Jett*, 439 F.3d at 1096 (quotations omitted).

11 “Deliberate indifference is a high legal standard.” *Toguchi v. Chung*, 391 F.3d
 12 1051, 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must
 13 both know of and disregard an excessive risk to inmate health; “the official must both be
 14 aware of facts from which the inference could be drawn that a substantial risk of serious
 15 harm exists, and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825,
 16 837 (1994). Deliberate indifference in the medical context may be shown by a
 17 purposeful act or failure to respond to a prisoner’s pain or possible medical need and
 18 harm caused by the indifference. *Jett*, 439 F.3d at 1096. Deliberate indifference may
 19 also be shown when a prison official intentionally denies, delays, or interferes with
 20 medical treatment or by the way prison doctors respond to the prisoner’s medical needs.
 21 *Estelle*, 429 U.S. at 104-05; *Jett*, 439 F.3d at 1096.

22 Deliberate indifference is a higher standard than negligence or lack of ordinary
 23 due care for the prisoner’s safety. *Farmer*, 511 U.S. at 835. “Neither negligence nor
 24 gross negligence will constitute deliberate indifference.” *Clement v. California Dep’t of*
25 Corr., 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); *see also Broughton v. Cutter Labs.*,
 26 622 F.2d 458, 460 (9th Cir. 1980) (mere claims of “indifference,” “negligence,” or
 27 “medical malpractice” do not support a claim under § 1983). “A difference of opinion
 28 does not amount to deliberate indifference to [a plaintiff’s] serious medical needs.”

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1 *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). A mere delay in medical care,
 2 without more, is insufficient to state a claim against prison officials for deliberate
 3 indifference. *See Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407
 4 (9th Cir. 1985). The indifference must be substantial. The action must rise to a level of
 5 “unnecessary and wanton infliction of pain.” *Estelle*, 429 U.S. at 105.

6 **A. Defendants Ryan, Pratt, and McKamey**

7 As noted above, a § 1983 plaintiff must allege that he suffered a specific injury as
 8 a result of specific conduct of a defendant and show an affirmative link between the
 9 injury and the conduct of that defendant. *See Rizzo*, 423 U.S. at 371-72, 377. There is no
 10 *respondeat superior* liability under § 1983, and, therefore, a defendant’s position as the
 11 supervisor of persons who allegedly violated Plaintiff’s constitutional rights does not
 12 impose liability. *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658, 691-92
 13 (1978); *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992); *Taylor v. List*, 880 F.2d
 14 1040, 1045 (9th Cir. 1989). “Because vicarious liability is inapplicable to *Bivens* and
 15 § 1983 suits, a plaintiff must plead that each Government-official defendant, through the
 16 official’s own individual actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676.

17 Plaintiff has not alleged that Defendant Ryan, Pratt, and McKamey personally
 18 participated in a deprivation of Plaintiff’s constitutional rights, were aware of a
 19 deprivation and failed to act, or formed policies that resulted in Plaintiff’s injuries.
 20 Instead, Plaintiff appears to be asserting claims against these Defendants based solely
 21 upon their supervisory positions within ADOC—a theory of liability that is not
 22 cognizable under § 1983. Accordingly, Ryan, Pratt, and McKamey will be dismissed
 23 without prejudice.

24 **B. Corizon**

25 To state a claim under § 1983 against a private entity performing a traditional
 26 public function, such as providing meals or medical care to prisoners, a plaintiff must
 27 allege facts to support that his constitutional rights were violated as a result of a policy,
 28 decision, or custom promulgated or endorsed by the private entity. *See Tsao v. Desert*

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1 *Palace, Inc.*, 698 F.3d 1128, 1138-39 (9th Cir. 2012); *Buckner v. Toro*, 116 F.3d 450, 452
 2 (11th Cir. 1997). A plaintiff must allege the specific policy or custom and how it violated
 3 his constitutional rights. A private entity is not liable simply because it employed
 4 individuals who allegedly violated a plaintiff's constitutional rights. *See Tsao*, 698 F.3d
 5 at 1139.

6 As a privately owned corporation that provides medical care to state inmates under
 7 contract with the state, Corizon may be considered a "person" for purposes of 42 U.S.C.
 8 § 1983. However, while Plaintiff alleges that Corizon "failed to properly train [its]
 9 nurses," he does not identify an express policy that was established or endorsed by
 10 Corizon, and the facts he alleges concerning delays in treatment are not sufficient to
 11 create an inference that such a policy exists. Indeed, the Complaint does not contain any
 12 allegations regarding Corizon's purported failure to train its staff other than Plaintiff's
 13 characterization of that training as inadequate. Accordingly, Plaintiff has failed to state a
 14 claim against Corizon, and it will be dismissed without prejudice.

15 **C. Defendants Sedlar, Reece, and Does I-IV**

16 Plaintiff's claims against Defendants Sedlar, Reece, and Does I-IV are not
 17 sufficient to state a claim under the Eighth Amendment. Although Plaintiff alleges that
 18 he asked Defendant Sedlar and "several nurses" if he could be seen by a doctor, it is
 19 unclear from the Complaint whether these Defendants recognized that Plaintiff had a
 20 serious medical need. In addition, Plaintiff has failed to indicate that he made each of
 21 these Defendants aware of the lengthy delays that he was experiencing in connection with
 22 his requests for treatment.

23 Plaintiff's allegations against Defendant Reece are similarly deficient, as they do
 24 not demonstrate a deliberate indifference to Plaintiff's medical need. On the contrary, it
 25 is clear from the allegations in Count One that Reece evinced a willingness to treat
 26 Plaintiff. And, absent additional facts, Plaintiff's claim that Reece was unwilling to
 27 perform surgery on Plaintiff's hand without performing surgery on his wrist does not
 28 support a claim of deliberately indifferent conduct. There are many reasons a doctor

1 might elect to forego a surgical procedure under such circumstances. For instance, it is
2 entirely possible that the risks associated with surgery would outweigh the potential
3 benefit of a procedure performed on the hand alone. Plaintiff's claim that Reece refused
4 to perform the surgery on his hand because he "ha[d] an interest in minimizing surgical
5 procedures" is not only conclusory, but it is also inconsistent with his allegation that
6 Reece would not operate on Plaintiff's hand unless he also operated on his wrist.
7 Accordingly, Plaintiff has failed to state a claim for constitutionally inadequate medical
8 care against Defendants Sedlar, Reece, and Does I-IV, and these Defendants will be
9 dismissed without prejudice.

10 **IV. Claims for Which an Answer Will be Required**

11 Liberally construed, Plaintiff has stated an Eighth Amendment claim against
12 Defendant John Doe Nurse. However, while Plaintiff has alleged his claim with enough
13 specificity to require an answer from this individual, the Court will not direct that service
14 be made on John Doe Nurse at this time. Generally, the use of anonymous-type
15 appellations to identify defendants is not favored. Rule 10(a) of the Federal Rules of
16 Civil Procedure requires a plaintiff to include the names of the parties in the action. And,
17 as a practical matter, it is impossible in most instances for the United States Marshal or
18 his designee to serve a summons and complaint on an anonymous defendant.

19 Plaintiff has not explained why he has not supplied the name of John Doe Nurse,
20 and it is unclear why Plaintiff was unable to identify this Defendant. Nevertheless, the
21 Court will not dismiss the Complaint at this time. *See Wakefield v. Thompson*, 177 F.3d
22 1160, 1163 (9th Cir. 1999) (where identity of alleged defendants is unknown prior to
23 filing of complaint, plaintiff should be given an opportunity through discovery to identify
24 the unknown defendants, unless it is clear that discovery would not uncover the identities
25 or that the complaint would be dismissed on other grounds). The Court will give Plaintiff
26 30 days to respond to this Order in a written pleading entitled "Response." Plaintiff's
27 Response must include either (1) the name of the Defendant identified as "John Doe
28 Nurse" or (2) an explanation of what Plaintiff has done to try to learn this Defendant's

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1 name, a description of what discovery Plaintiff would undertake to learn his name, and
2 the identity of at least one person who could be served with discovery. If Plaintiff fails to
3 timely file his Response, this case will be dismissed without prejudice and without further
4 notice.

5 **V. Warnings**

6 **A. Address Changes**

7 Plaintiff must file and serve a notice of a change of address in accordance with
8 Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion
9 for other relief with a notice of change of address. Failure to comply may result in
10 dismissal of this action.

11 **B. Copies**

12 Because Plaintiff is currently confined in an Arizona Department of Corrections
13 unit subject to General Order 14-17, Plaintiff is not required to submit an additional copy
14 of every filing for use by the Court, as would ordinarily be required by Local Rule of
15 Civil Procedure 5.4. If Plaintiff is transferred to a unit other than one subject to General
16 Order 14-17, he will be notified of the requirements regarding copies for the Court that
17 are required for inmates whose cases are not subject to General Order 14-17.

18 **C. Possible Dismissal**

19 If Plaintiff fails to timely comply with every provision of this Order, including
20 these warnings, the Court may dismiss this action without further notice. *See Ferdik v.*
21 *Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action
22 for failure to comply with any order of the Court).

23 **IT IS ORDERED:**

24 (1) Defendants Ryan, Pratt, McKamey, Corizon, Sedlar, Reece, and Does I-IV
25 are **dismissed** without prejudice.

26 (2) Within **30 days** of the date of this Order, Plaintiff must file a **Response** to
27 this Order that includes either (1) the name of the Defendant identified as “John Doe
28 Nurse” or (2) an explanation of what Plaintiff has done to try to learn these Defendants’

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1 names, a description of what discovery Plaintiff would undertake to learn his name, and
2 the identity of at least one person who could be served with discovery.

3 (3) If Plaintiff fails to file a Response within 30 days, the Clerk of Court must
4 enter a judgment of dismissal of this action without prejudice and without further notice
5 to Plaintiff.

6 Dated this 18th day of September, 2015.
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David G. Campbell

10 David G. Campbell
11 United States District Judge
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